

Catalan secessionism faces the European Union

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Catalan secessionists have constructed a hypothetical place for an independent Catalonia within the EU on the basis of three explicit assumptions.¹ See on this issue Carlos Closa (ed.) *Secession from a Member State and Withdrawal from the European Union; Troubled Membership* (Cambridge University Press 2017). They assume, firstly, that the EU will treat their demands sympathetically. This first assumption explains the calls from various political actors, including the Mayor of Barcelona, Ada Colau, the Catalan Minister of Foreign Affairs, Raül Romeva and even the European Parliament's Green Group who coincided, prior to 1-O, in their request to the Commission for mediation. And after the unfortunate events of 1-O, the Catalan government has formally called for a European mediation. Secondly, secessionists assume that a hypothetical independent Catalonia would have the option of joining the EU even in the case of a unilateral secession.² A. González Bondía, 'La Unión Europea ante el reto del derecho a decidir', in E. Segarra, (ed.), 'Is there a right to decide? Questions and answers on the open process in Catalonia', (Tibidabo Edicions 2014), p. 123; J. Ridao Martín, 'La Unió Europea i els nous Estats sorgits per secessió dels seus membres. Una hipòtesi per Catalunya', *Revista Jurídica de Catalunya* 2014, vol. 113, p. 331; J. Ridao Martín and A. González Bondía, 'La Unión Europea ante la eventual creación de nuevos Estados surgidos de la secesión de Estados miembros', *Revista de Derecho de la Unión Europea* No. 27-28 (2014) p. 363 or that, finally, it could remain in the EU and become a new member state without a solution of continuity in the case of a secession agreed with the Spanish state.

A rigorously minimal interpretation of the TEU questions these three assumptions. Firstly, the Treaty obliges the Commission in particular and the EU in general to respect the territorial integrity of their states and the exercise of their essential functions, including law and order and the maintenance of security (art. 4.3). An intromission or action from the Commission without the express consent of the Spanish authorities could easily be interpreted as an infringement of the treaties. Alternatively, secessionists have reclaimed EU intervention on the assumption that Spanish authorities could be violating the values of Article 2, specifically by infringing on the right to freedom of association and expression, and call for respect for the value of democracy contained in the same place to justify EU intervention. As this last argument underpins the proposal on the compatibility of unilateral secession with EU accession, I will refer to it below.

Defenders of unilateral secession appeal to the democracy value in Article 2 to argue for a compatibility of this process with EU membership: since the EU recognises this value in Article 2, they derive a duty to therefore recognise a (majority) democratic decision from a given polity. However, this thesis contains a logical trap: none of its proponents have explained the source of this obligation. What obliges a political entity to recognize the effect of decisions made by a third party if this obligation has not been formally established beforehand? To properly weigh the implications of this expectation, one could think back to the effects on the EU when the Greek citizens rejected the terms of their rescue package by referendum (and compare this with the treatment of the Brexit referendum, covered by an explicit provision in the treaties).

The most common counterargument to the invocation of the democratic principle is the principle of legality (inserted in the broader notion of the rule of law). Thus, Spanish central authorities have consistently adhered to this principle. Facing the (apparent) contradiction between these two values, authors close to the secessionist theses (see footnote 2) argue that, in case of opposition between the two values (sic), the EU would have to come up with a solution. However, this solution contradicts the nature of the Union itself, which rests on an integral understanding of its values, that is, they are not conceived separately and even less in opposition. The test of the unacceptability of opposing values in the European context as a mechanism to justify specific measures comes in the way in which the European Commission has dealt with the Hungarian and Polish governments since 2012 and 2015 respectively. Both of them have undertaken "illiberal" (Orban dixit) political reform projects, invoking precisely their electoral majority (democracy). The Commission has invoked instead the respect of the "rule of law": the existence of an electoral majority does not permit the violation of fundamental

principles of community law.

Assuming (as a mere intellectual exercise) that the Commission would lend itself to the exercise of arbitrating between principles, the intended unilateral secession would have to satisfy the legality test. The laws of the Catalan Parliament that are the foundations of that process (such as the referendum law and the transitional law) would have to face the test of compatibility with European standards. Regarding the referendum law, the Venice Commission has already stated (informally, given that no Spanish authority has asked for it) the need to comply with the Constitution and the law. Hence, it is more than dubious that an independent body certifies as compatible with the principle of legality a law that contains several vices: it violates not only the Constitution but also the Catalan Statute of Autonomy itself and it has been adopted through a procedure of dubious validity and circumventing the recommendations of the Council of Statutory Guarantees itself. Nevertheless, secessionist may be willing to put to test the international validity of their own legislation. The final argument relating to the unfeasibility of a unilateral secession within the EU refers to the principle of loyal cooperation between the states that the treaty requires: taken in its most extreme interpretation, one could conceive that the hypothetical recognition by members of the Union of a state arising from unilateral secession clashes with the EU Treaty, and the original state could actively claim respect for that principle.

Finally, the third assumption of secessionist refers to the possibility of a seamless accession in the case of a secession agreed with the original state. Although the Commission has already conclusively denied such a possibility, it is worthwhile to revisit the normative arguments which were firstly discussed at length in the Scottish case. These referred, on the one hand, to the democratic principle (i. e. the EU's obligation to recognise a democratic decision) and, on the other hand, to the concern that citizens must not be deprived of their rights. On the first point, the above-mentioned argument applies: no matter how democratic it may be, a group of citizens has no justification for imposing on third parties the consequences of their (majority) decision if this obligation has not been formalized previously. The possible loss of rights has more substance. Of course, this results and is a consequence of the decision taken for those who make it. Pretending to ignore consequences of (democratic) actions leads to a "Peter Pan" model of democracy, without responsibilities. Admittedly, however, a depriving of rights is not the best standard of behaviour (even when it is a consequence of the acts of the rights-holders). One might think that the EU could provide transitional solutions to maintain the rights of these people, but under no circumstances can this amount to recognising statehood rights or the total maintenance of the *acquis* of EU membership for newly independent states. Acquiring sovereignty has the unsympathetic side of having to win a seat in the club of states.

References [+]

1. ↑ See on this issue Carlos Closa (ed.) *Secession from a Member State and Withdrawal from the European Union; Troubled Membership* (Cambridge University Press 2017)
2. ↑ A. González Bondía, 'La Unión Europea ante el reto del derecho a decidir', in E. Segarra, (ed.), 'Is there a right to decide? Questions and answers on the open process in Catalonia', (Tibidabo Edicions 2014), p. 123; J. Ridao Martín, 'La Unió Europea i els nous Estats sorgits per secessió dels seus membres. Una hipòtesi per Catalunya', *Revista Jurídica de Catalunya* 2014, vol. 113, p. 331; J. Ridao Martín and A. González Bondía, 'La Unión Europea ante la eventual creación de nuevos Estados surgidos de la secesión de Estados miembros', *Revista de Derecho de la Unión Europea* No. 27-28 (2014) p. 363

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